S. HRG. 100-608

FEDERAL COURTS STUDY ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND ADMINISTRATIVE PRACTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 951

A BILL ENTITLED THE "FEDERAL COURTS STUDY ACT"

JUNE 15, 1987

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FEDERAL COURTS STUDY ACT

MONDAY, JUNE 15, 1987

U.S. SENATE,
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:05 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Howell Heflin (chairman of the subcommittee) presiding.

Also present: Senator Grassley.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. The Subcommittee on Courts and Administrative Practice of the Committee on the Judiciary is holding hearings today on S. 951, the Federal Courts Study Act.

It is both a pleasure and a privilege to welcome our distinguished witnesses to this subcommittee. Today we will hear from two individuals with whom I have had the pleasure of working since coming to the U.S. Senate, the Honorable Judge Clifford Wallace of the Ninth Circuit Court of Appeals and Professor Leo Levin, Director of the Federal Judicial Center.

Professor Levin, we are going to miss you. You are going to retire as the Director of the Federal Judicial Center, but you are being succeeded by a very able Alabamian, Judge John Godbold, who served as the chief judge of the fifth circuit and the eleventh circuit. We want to wish you well and want you to come back and visit with us anytime that you feel you can. We are certainly going to miss you.

I have found it often difficult to develop a constituency when discussing proposals to change our court system or in any way to deviate from the status quo. And I grant you that these are not glamorous issues that Congress considers on a day-by-day basis, but in my belief they are some of the most important issues.

Those individuals who appear year after year to bring the problems of the Federal Judiciary and our State courts to the attention of law makers are those individuals who do so not for any personal gain, but because of an untiring and persistent belief that dedicated individuals can make a difference in how our judicial system is administered.

There is no doubt that an effective administration of justice is the key to ensuring the life, liberty, and happiness of all Americans. Our constitutional freedom is premised on certain assump-

tions. One is a belief that our judicial system will serve the needs of every individual.

We cannot be a completely free society if our courts are not equipped to render justice equally and swiftly. We cannot be free when intercircuit conflicts and a backlog of cases prevent the orderly enforcement of our most cherished constitutional rights. And we cannot be free if we continue to ignore the mounting pressures being exerted on our Federal court system.

On April 8, 1987, I introduced S. 951, the Federal Courts Study Act, which would establish a Federal Courts Study Commission for a 10-year period. The purpose of the commission will be to evaluate and suggest eventual solutions to the problems currently facing our courts, to make a complete study of the jurisdiction of the Federal and State courts to recommend revisions to the Constitution and laws of the United States, to assimilate studies on the effectiveness of our courts, and to develop a long-range plan for the judicial system.

This legislation will help develop a workable overall plan for the future, and it will avoid haphazard and piecemeal reforms. Former Chief Justice Warren Burger was instrumental in drawing attention to the need for study and change, and in July of 1980, he requested Judge Clifford Wallace of the Ninth Circuit Court of Appeals to look toward the future and predict the state of our court system by the year 2000. The concept for the study commission evolved from the outstanding work of Judge Wallace.

In the 96th Congress, Senator Thurmond and I introduced S. 3123 to establish a 16-member commission for a 2-year period to study the jurisdictional basis of both the State and the Federal courts and the workload facing the courts. No further action was taken on the bill in the 96th Congress.

In the 97th Congress, Senator Thurmond and I introduced separate legislation. Senator Thurmond introduced S. 675, which proposed a study commission for a 2-year period. I introduced S. 1530, to establish a permanent Federal Court Study Council and a temporary commission to study and make recommendations to the council.

The Committee on the Judiciary held hearings in May of 1982 to consider both of these proposals. The hearings were held on May 12, 1982, and the witness list consisted of distinguished members of the legal and judicial branches of our Government, including Professor Daniel Meador, the James Monroe professor of law at the University of Virginia School of Law; Judge Clifford Wallace of the Ninth Circuit Court of Appeals; Judge Robert Vance of the Eleventh Circuit Court of Appeals; George H. Williams, the executive vice president and director of the American Judicature Society; and Charles F. Abernathy, a professor of law at Georgetown University Law Center. As a result of these hearings, new legislation was introduced and was eventually passed by the Senate on October 1, 1982. Unfortunately, the House of Representatives did not pass that bill.

In the 98th and the 99th Congresses, I introduced similar legislation, but neither bill was considered by the Senate. And again, in the 99th Congress I introduced S. 601, which was reported by the Subcommittee on Courts.

As is often quoted, the task of seeking judicial reform is not for the short-winded. Those of us who believe in legislation of this nature do so not for any political reason, but simply because we believe the proposal has merit. Progress is the reward of persistence, and for those of us who care about the future of this judiciary, we will not be deterred by inaction.

Judge Wallace submitted his working paper "Future of the Judiciary" on February 20, 1981, 6 years ago. In those 6 years the problem has not gone away and a solution has not been achieved. The increase in court cases shows no signs of declining, and adding personnel provides only a temporary reprieve.

In March 1985, Judge Wallace updated his original working paper and presented it to the Conference on the Judiciary at Williamsburg, VA. The date has changed, but the reason for the commission is still just as viable. Over a 10-year period, from 1977 to 1986, the number of civil cases filed in the Federal District Court has increased from 130,567 to 254,828. The number of cases on the Supreme Court Docket in 1977 was 4,704. In the last term, which ended July 1986, there were 5,158 cases on the docket.

As legislators we have a responsibility to learn from the past, take heed of the present, and prepare for the future. Some of my colleagues instantly dislike the idea of a study commission, but the purpose of this legislation is more far-reaching than a mere study of our Federal court system.

Study is the first function, drawing upon the information and the research which has existed on the shelves of many libraries over the past 10 years. This legislation goes beyond study to recommendations for change, and this is the critical point. This legislation provides a mechanism for implementing needed court reform.

That is where commissions in the past have fallen short. They have only had the authority to make recommendations, not to follow through on their implementation. It is important to note that this legislation combines the expertise of the three branches of Government. No one branch operates in a vacuum, and to really address the future of the judiciary, it will demand a reasoned, balanced, bipartisan approach.

Granted, any legislative proposals will have to be enacted by Congress, but if the stage is not first set, in the initial proposal, the proposal will never become reality.

Chief Justice William Rehnquist in his 1986 yearend report on the Federal Judiciary commented:

> In 1987, it is already clear, there must be initial attention to continuing problems in this country's administration of justice. Those in the judicial branch have their perspectives on the administration of justice and its needs. Those in the legislative branch and in the executive branch have theirs. So too do the bar and the citizenry. The challenge is to realize the potential of these perspectives.

The greatness of our Nation's judiciary will depend on our ability to determine our future needs and revise our judicial system in line with our constitutional principles. This legislation provides us an opportunity to shape the future of our judiciary, not merely accept what evolves over time because of our inaction.

The commission represents such an approach. It has the support of legislators, judges, and legal scholars. The commission is an investment in our future, and it represents a commitment to a strong

and just judicial system. We have a rare opportunity to shape our judicial system. It is an opportunity we should not miss.

[A copy of S. 951 follows:]

II

100TH CONGRESS
1ST SESSION

S. 951

Entitled the "Federal Courts Study Act".

IN THE SENATE OF THE UNITED STATES

APRIL 8 (legislative day, MARCH 30), 1987

Mr. HEFLIN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

Entitled the "Federal Courts Study Act".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Courts Study Act".

ESTABLISHMENT AND PURPOSES OF THE COMMISSION

SEC. 2. (a) There is hereby established a Federal Courts Study Commission on the future of the Federal Judiciary (hereafter referred to as the "Commission").

(b) The purposes of the Commission are to—

(1) study the jurisdiction of the courts of the United States;

(2) evaluate the procedures, personnel, business and administration of the courts;

(3) examine problems currently facing the courts;

(4) order, receive, and review reports from all dispute resolving bodies, including courts, administrative agencies, and alternative dispute resolution entities; and further, collect, and review all private and public studies concerning the effectiveness of courts of the United States, the jurisdiction of the courts and their procedures, personnel, business, and administration;

(5) report to the President, the Congress, the Judicial Conference of the United States, and the State Justice Institute, on the revisions, if any, in the Constitution and laws of the United States where the Commission, based on its study and evaluation, deems advisable; and

(6) develop a long-range plan for the future of the Federal Judiciary, including assessments involving—

(A) alternative methods of dispute resolution;

(B) the actual structure and administration of the Federal court system;

(C) the manner in which courts handle cases;

(D) methods of resolving intracircuit and intercircuit conflicts in the court of appeals; and

(E) the types of disputes resolved by the Federal courts and Federal agencies.

MEMBERSHIP OF THE COMMISSION

SEC. 3. (a) The Commission shall be composed of fourteen members appointed, within ninety days after the effective date of this Act, as follows:

(1) four members appointed by the President of the United States with not more than two members from any major political party;

(2) two members of the Senate appointed by the President pro tempore of the Senate, one of whom shall be appointed upon the recommendation of the majority leader and one of whom shall be appointed upon the recommendation of the minority leader;

(3) two members of the House of Representatives appointed by the Speaker of the House of Representatives, one of whom shall be appointed upon the recommendation of the majority leader and one of whom shall be appointed upon the recommendation of the minority leader;

(4) four members appointed by the Chief Justice of the United States with no more than two of such members from any major political party; and

(5) two members appointed by the Conference of Chief Justices, with no more than one such member being from any major political party.

(b) The membership of the Commission shall be selected in such a manner as to be broadly representative of the various interests, needs, and concerns which may be affected by the jurisdiction of the Federal courts.

(c) The term of office of each Commission member shall be five years. Any member who was appointed pursuant to paragraph (2) or (3) of subsection (a) who vacates such office during his term of office with the Commission shall vacate his position on the Commission also. A member appointed to fill any such vacancy shall be appointed only for the remainder of his predecessor's term. Vacancies in the Commission shall not affect its powers and shall be filled in the same manner in which the original appointment was made.

(d) The Commission shall select a Chairman and a Vice Chairman from among its members.

(e) Eight members of the Commission shall constitute a quorum.

POWERS OF THE COMMISSION

SEC. 4. (a) The Commission or, on the authorization of the Commission, any subcommittee thereof may, for the purpose of carrying out its functions and duties, hold such hearings and sit and act at such times and places, administer such oaths, and request the attendance and testimony of such witnesses, and the production of such books, records, correspondence, memorandums, papers, and documents as the

Commission, or any such subcommittee may deem advisable.

(b) The Administrative Office of the United States Courts, and the Federal Judicial Center, and each department, agency, and instrumentality of the executive branch of the Government, including the National Institute of Justice and independent agencies, shall furnish to the Commission, upon request made by the Chairman or Vice Chairman, such information and assistance as the Commission may reasonably deem necessary to carry out its functions under this Act, consistent with other applicable provisions of law governing the release of such information.

(c) Subject to such rules and regulations as may be adopted by the Commission, the Chairman shall have the power to—

(1) appoint and fix the compensation of an Executive Director, and such additional staff personnel as he deems necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such Act relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of such Act, and

(2) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code, but at rates not to exceed $200 a day for individuals.

(d) To the extent or in such amounts as are provided in appropriation Acts, the Commission is authorized to enter into interagency agreements or contracts with the Federal Judicial Center, the National Center for State Courts, Federal or State agencies, private firms, institutions, and individuals for the conduct of research or surveys, the preparation of reports, and other activities necessary to the discharge of its duties.

(e) The Commission is authorized to receive financial assistance from sources other than the Federal Government, including assistance from private foundations.

(f) The Commission is authorized, for the purpose of carrying out its functions and duties pursuant to this Act, to establish advisory panels consisting of members either of the Commission or of the public. Such panels shall be established to provide expertise and assistance in specific areas, as the Commission deems necessary.

FUNCTIONS AND DUTIES

SEC. 5. (a) The Commission shall—

(1) make a complete study of the jurisdiction of the courts of the United States and of the several States and report to the President and the Congress on

such study within two years after the effective date of this Act;

(2) recommend revisions to be made to the Constitution and laws of the United States as the Commission, on the basis of such study, deems advisable;

(3) collect and review studies on the effectiveness of the courts;

(4) develop a long-range plan for the judicial system;

(5) submit annual written reports to the President and the Congress on the condition of the judiciary, which shall contain a summary of their findings, recommendations, and conclusions, submitting the first such report within one year after the study concluded pursuant to paragraph (1);

(6) make any recommendations and conclusions it deems advisable every year thereafter.

(b) The study of the jurisdiction of the courts conducted by the Commission pursuant to paragraph (1) of subsection (a) shall be completed within two years after the effective date of this Act and shall be given priority over the other functions and duties being carried out by the Commission during such time.

COMPENSATION OF MEMBERS

SEC. 6. (a) A member of the Commission who is an officer or full-time employee of the United States shall re-

ceive no additional compensation for his or her services, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of duties vested in the Commission, but such amount shall not exceed the maximum amounts authorized under section 456 of title 28, United States Code.

(b) A member of the Commission who is from the private sector shall receive $200 per diem for each day (including traveltime) during which he or she is engaged in the actual performance of duties vested in the Commission, plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties, but such amounts shall not be in excess of the maximum amounts authorized under section 456 of title 28, United States Code.

REPORTS

SEC. 7. (a)(1) The Commission shall transmit to the President and to the Congress, not later than two years after the effective date of this Act, a study of the jurisdiction of the courts of the United States and of the several States pursuant to section 5(a)(1) of this Act. The Commission shall thereafter, in keeping with its functions, annually transmit to the President and the Congress a report on the condition of the judiciary and summarize any findings, and make any recommendations and conclusions it deems advisable on the basis of its previous activities.

(2) Not later than ten years after the effective date of this Act the Commission shall submit a final report containing a detailed statement of the findings and conclusions of the study conducted pursuant to this Act, together with any recommendations it deems advisable.

EXPIRATION OF THE COMMISSION

SEC. 8. The Commission shall cease to exist on the date ninety days after it transmits the final report pursuant to section 7 of this Act.

AUTHORIZATION OF APPROPRIATIONS

SEC. 9. To carry out the purposes of this Act there are authorized to be appropriated $700,000 for each of the fiscal years 1988 and 1989, and $800,000 for each of the eight succeeding fiscal years 1990 through 1997.

EFFECTIVE DATE

SEC. 10. This Act shall become effective upon the date of enactment.

O

Senator HEFLIN. Again, I welcome our distinguished witnesses, Judge Wallace, Professor Levin. May I ask that you both come forward at this time. Judge Wallace, we will begin with you. In my opinion, the record has been made on this issue. In trying to move this legislation in the last Congress, there were some questions raised as to the practical workings of the commission, the purposes and whether existing organizations could handle the functions of the commission. In an attempt to address some of these questions, I turn to the experts.

Before I ask Judge Wallace to begin on the testimony pertaining to this, I will call upon my colleague, Senator Grassley, for opening statements that he would like to make.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you, Mr. Chairman.

I know from your opening statement that you feel very strongly about a very good purpose for this commission. No doubt, from your standpoint there is very good reason for it. I do not question that reason but I do raise some questions that I hope a hearing like this will answer for me and the people who sometimes raise a question about whether or not a commission is the way to go about accomplishing our goals.

It is no doubt true that our civil justice system is in need of some repair. What I am less sure of is how some new commission is going to help solve some of the problems that everybody agrees are real problems.

Can you tell me how the work of this commission will differ from groups that already study the legal system, such as the Judicial Conference, the ABA, the National Center for State Courts? I suppose we could go on and on. So what I will be particularly looking for in this hearing—and if any others follow—is what can this commission do that all of these others collectively cannot do?

The proposed commission, I see, would study alternative dispute resolution methods, something I have a keen interest in and hopefully will be pursuing with some legislation. Traditionally, adjudication through the Federal court system is, of course, both slow and expensive. For example, the Administrative Office of the U.S. Courts reports that it commonly takes 1½ to 3 years to resolve a civil dispute through jury trial.

Alternative dispute resolution has been lauded as a solution to this judicial backlog. Alternative dispute resolution is not a new concept. It has been studied by the Federal courts, the State courts and the Federal administrative agencies, and I will just show you a book here by the Administrative Conference of the United States called "A Source Book: Federal Agency Use of Alternative Means of Dispute Resolution."

So what I will be looking for in a hearing like this is how much more study of alternative dispute resolution do we have to have before we start putting some of our knowledge into practice.

Another of the proposed areas of study and recommendation is the resolution of Federal intercircuit conflicts. Of course, we have had several hearings on this issue in the Judiciary Committee, but

legislation has been bogged down. It is not so much that more study needs to be done, but for Congress being willing to wrestle with the issue. But I hope that somebody will shed light upon how the commission might add to this debate, this specific problem, things that we have not already studied on this issue.

So I do not in any way say that the commission approach is not a legitimate approach, but I think that we ought to look at what has been done in the past and see that we do not go down the same road we have before, because on so many issues I think it is a question of acting and not studying.

So, Mr. Chairman, I look forward to this hearing to maybe shed light on some of the new route that this commission will take to help us solve these problems that everybody admits are real problems.

Senator HEFLIN. Thank you, Senator Grassley.

We would be delighted at this time to hear from Judge Wallace.

STATEMENT OF HON. J. CLIFFORD WALLACE, JUDGE OF THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

Judge WALLACE. Thank you, Senator Heflin, Senator Grassley. It is an honor to appear before your committee today.

I want to express my appreciation to Senator Heflin and to Senator Thurmond, who have championed this important cause over the last 5 years.

If it is agreeable with the committee, Senator, I would like to submit my written testimony for the record, and then just comment on it so that we can get to the questions that you and Senator Grassley might have.

Senator HEFLIN. Without objection.

Judge WALLACE. I think the main issue that you have before you is: Is there any reason why the Senate should not do what it did do in 1982? That is, after full consideration of a substantially similar bill in 1982, the Senate agreed the commission was needed and passed the bill. It is unfortunate the House did not act, because the evidence over the last 5 years clearly demonstrates that the Senate's 1982 action was important, proper, and necessary.

I hope that this current bill, S. 951, will move towards passage very rapidly. I point out that Congressman Mazzoli has introduced the same bill in the House.

I attended a seminar on the Administration of Justice at Charlottesville, VA, on April 10, 11, and 12, 1987. This proposed commission was studied there. As you will recall, this seminar is sponsored by Brookings and, while usually held at Williamsburg, it was shifted to Charlottesville.

Members of the Senate and House Judiciary Committees were present. As you know, those proceedings are not transcribed and are not considered to be on the record. I believe, however, it is fair to state that there was a general consensus that this concept is appropriate, and that legislation should be enacted immediately.

I was especially interested that Chief Justice Rehnquist commented favorably on the bill. Chief Justice Burger has been a consistently strong proponent of the concept. Attorney General Meese

indicated he was in favor of the bill. The idea is one that has been considered by the Justice Department.

I was also pleased that Chairman Rodino expressed strong statements in favor of a commission. It was clear that he is prepared to provide leadership for passage of such a bill. It is true that for 5 years the House has not acted, but I do not think it would be an idle act for the Senate to pass the bill this year, because I believe there is leadership in the House willing to go forward. I might also add that Congressman Kastenmeier has stated to me that he is willing to hold hearings on a bill in his subcommittee.

Why then should not the Senate act as it did in 1982 and once more enact this legislation? It seems to me there can be no persuasive reason why it should not. Can we say the situation is no longer critical? Certainly there are many people who believe that there is increased congestion in the courts and, perhaps for that reason alone, the bill should be enacted.

I understand there is a difference of opinion among scholars as to how critical the congestion problem is, but I suggest to you that most of your constituents would say that it is unacceptable. As Senator Grassley has pointed out, we have long delays, and those delays should be overcome.

And the problem is not just the raw material of how many additional cases are in the courts. The cases are far more complex than they were before: Courts have huge class actions and antitrust cases; courts manage prisons, hospitals, etc., and so it goes; a constant menu of very difficult and time-consuming cases.

This is a stress that judges feel; we do not have the machinery in place to dispose of the cases more effectively. Based upon my experience as a Federal judge over the last 17 years, observing the institution and its judges, I believe that the Federal judges are good, solid judges who are working hard and well. But more help is needed, and I suggest to you that just continuing to add new judges to meet this problem is counterproductive.

In the vintage years of Learned Hand, a three-judge panel on the second circuit decided approximately 125 cases per year. In the second circuit now they must dispose of 90 percent more cases. It is a small wonder that we do not have many "Learned Hand" decisions today.

There are other pressing questions that continue to be asked. Why is a commission needed? Some grant that there is a critical need to study court problems but they ask why can not a presently existing body deal with these challenges? Indeed, Senator Grassley has raised that question, and I think it is a proper inquiry. It is one that should be answered.

Two years ago I gave some thought to this issue: I wondered why the need could not be met by some entity other than this proposed commission I stated, and I state again, that a commission could bring together all of the other studies and, shedding premisconceptions, could make objective recommendations. Academic efforts are generally isolated. Broad-based efforts such as the Civil Litigation Research Project or the ongoing work of the Rand Institute for Civil Justice still do not aim toward a plan for future needs.

The Federal Judicial Center, of course, is one possibility for accomplishing this needed work. So is the Administrative Office of

the U.S. Courts. But I suggest to you that they have shortcomings that prevent them from doing so.

It seems clear to me that when dealing with such a delicate question as how the judicial system is to be modified, the political component is essential or any study is doomed to be nothing more than a dust-gatherer. The great benefit of the three-branch commission is that it involves the other two branches which are necessary for action—the legislative and the executive.

It may well be that the Administrative Office of the U.S. Courts and the Federal Judicial Center can provide data. It may also be true that the judges are in the best position to assess the needs of the courts. However, it is only through the responses of the political branches that action occurs. A three-branch commission is thus an indispensable part of the equation to solve the problem.

Can it be that enough is already known about the problem and no commission is needed to study it further? If the answers were known, complete solutions would be submitted to the Senate rather than a proposal for a study commission. We must look downstream for a decade or two to secure a vital perspective as to where the courts are going if they continue on their present course, and to recommend changes so that the courts can meet the future needs of our country.

Once that perspective has been established, the three-branch commission will be in a position to make annual reports to Congress, to recommend what is needed that year to solve current problems, as well as to make progress toward solving the problems the courts will face in the future. In short, the problem will be attacked in a business-like manner with proper planning and implementation.

It seems to me that one branch, the judiciary, can tell you its needs. Indeed, it has been doing so for quite a few decades. But it has done so without the political viewpoint. If, as the bill provides, there were two Senators and two Congressmen on the commission, not only would they know from their own perspectives what practically can be accomplished that year, but they would know, indeed, from the political perspective, what ought to be done in response to the needs of the people.

It is only through working together that we can accomplish this. Surely there is a separation of powers; it has been respected, and properly so. But I suggest it is time to build a bridge among the three branches so that we can come to a common understanding of what is needed for the courts and move forward toward a solution.

Senator Grassley, you made an important point; the great number of studies that have already been performed. Indeed, the concept of alternative means of dispute resolution is an idea whose time has come. I think most people believe that. But there is opposition to ADR's. There are those who say they do not, and should not, fit in the court structure. This needs further consideration. The concept and its implementation need further refinement.

But this commission could bring together all of the studies—not only the one to which you made reference but, also the myriad of studies that have been made on ADR's. The study would make them a part of an overall plan, one program, and would try to determine how they fit into the future of the court system. That is,

the commission can recommend not only what ADR's can accomplish today, which is important, but can evaluate what the courts will be like in 10 years, in 20 years, and how ADR's should fit in at that time.

I have been to many conferences, and I am sure you have too, where the entire ADR idea has been discussed. Professor Frank Sander from Harvard Law School, for example, has developed a marvelous concept of the courthouse with many rooms: the idea that a variety of ADR's can be alternatives to the mainstream courts in dispute resolution. But it is only in the conceptual stage.

For example, the Professor Frank Sander approach of the courthouse with many rooms has the Judge Wallace modification, and that is that the walls are made of glass so that each model can see the other, determine its advantages, and shuttle various types of disputes from one to the other if it turns out the disputes are in the wrong room.

But these are all concepts. No one has brought these concepts together into a pragmatic approach as to how they will fit in the court system. How will they become effective? How can they work best?

It seems to me that to solve that problem, not only for today, but to plan to solve the problem for a decade or two away, some permanency is needed. Otherwise, our effort will be in an intellectual culde-sac, with continued recycling of the problem when we find that time has overcome the prior analysis. But a three-branch commission can bring together all of these studies and take a look at what our needs will be in 20 years; it can make the annual recommendations to Congress, incrementally, so that we can move forward in a proper businesslike way toward an eventual solution that makes good sense.

Indeed, I have often said, facetiously—but perhaps there is some truth in it—that if the court system were in business, functioning the way it does, it would have been in chapter 11 long ago, because we simply do not operate in a businesslike way in planning for court needs.

There is one other issue, of course, that will be raised: the expense of a commission. In the Gramm-Rudman-Hollings era, every expenditure must be assessed carefully. You and I as taxpayers, I am sure, applaud this. I suggest with the critical nature of the subject matter, the question is better phrased, how can we not afford a commission?

The cost would be relatively minimal. A small staff is anticipated with research work to be contracted out to appropriate individuals or organizations. The primary responsibility of the commission, initially, would be to bring together all of the studies which have been completed and to arrange for additional needed research; it would then develop one meaningful plan which will provide a blueprint for the future of the judiciary. The commission will have the opportunity to make annual recommendations for changes. At the end of the sunset period, presently set at 10 years, it will have proven its merit, or it will disappear.

What will be the ultimate cost? What of this minor investment; how can it be paid off? Currently a band-aid approach is applied to court problems. This is at best inefficient and probably costs more

than incremental improvements to meet a long-term need. In 1 year, money may be spent on a "temporary lean-to," and it is later determined that it was unnecessary. Without long-range planning, inefficient expenditures are bound to occur.

In addition, the response to court needs so far has been to add another judge. There is no question that this is expensive. I have been advised that the average annual cost for an existing district judgeship, including salary and benefits for the judge and his staff and a fair allocation of his overhead and courtroom facilities, is $479,000; for a judge of the Court of Appeals, it is $483,000. This is a lot of money.

The implementation of a commission recommendation that would save the appointment of just two new judges will pay for the commission. I believe that the commission can easily do that. Indeed, the minor cost of the commission will be offset and, I suggest, will make money for the country. The cost of the commission should not be an issue.

I am pleased that the Subcommittee on Courts is once more reviewing this critical need, and I sincerely hope the Senate will take action this session.

Senator, I would be very pleased to answer any questions that either you or Senator Grassley might have.

[Submissions of Judge Wallace follow:]

STATEMENT OF J. CLIFFORD WALLACE
Judge of the United States Court of Appeals
for the Ninth Circuit

I am pleased to return to this Subcommittee for the third time to speak in favor of the establishment of a three-branch commission to study the future of the judiciary. Testimony from my earlier appearances can be found in "Hearing Before the Committee on the Judiciary, United States Senate, Ninety-Seventh Congress, Second Session on S. 675 and S. 1530, May 12, 1982, Serial No. J-97-114," at pages 35-38, 50-54, 56, and 84; my prepared statement can be found at pages 39-50; and in "Hearings Before the Subcommittee on Courts of the Committee on the Judiciary, United States Senate, Ninety-Eighth Congress, First Session on S. 645, March 11 and April 8, 1983, Serial No. J-98-16," at page 20; my prepared statement is at pages 50-61, and "Working Paper - Future of the Judiciary," is at pages 63-74. My enthusiasm for the commission has not wavered since I first considered this concept in 1980, during a study undertaken at the request of Chief Justice Warren Burger. The results of that study are found in the document entitled "Working Paper -- Future of the Judiciary," 94 F.R.D. 225.

I wish to express my admiration and respect for the outstanding leadership demonstrated by Senator Strom Thurmond and Senator Howell Heflin who have championed this cause for over half a decade. Indeed, because of their leadership, the United States Senate passed a bill in 1982 which would have created such a three-branch commission. It is unfortunate that the House did not, because over the last five years, I believe, the evidence clearly demonstrates the wisdom of the Senate's 1982 action and the importance of such a bill's being enacted as soon as possible. This year, Senator Heflin has introduced S. 951, which embraces the core concept of the idea. The same bill has been introduced in the House by Congressman Mazzoli (H.R. 1929).

At the Seminar on the Administration of Justice, held at Charlottesville, Virginia, on April 10-12, 1987, a commission to study the future of the judiciary was once more discussed. Although those proceedings are not recorded and are not considered on the record, I believe it is fair to state that there was a general consensus that the concept is appropriate and that legislation should be enacted. Chief Justice Rehnquist, Attorney General Meese, and Chairman Rodino all indicated that the idea has merit. Chairman Rodino stated that he had been considering this approach for some years and indicated his disposition to proceed with a bill.

Why then should not the Senate do what it did in 1982 and once more enact the bill? It seems to me there is no persuasive reason why it should not. Can we say that the situation is no longer as critical? Certainly, many people believe that there is increased congestion in the courts and, perhaps, for that reason alone action is necessary.

The great philosopher Goethe quit the legal profession in disgust because of the backlog of cases that had been languishing in German courts. Litigants in our country feel a similar intolerance when they must stand in long lines for final resolution of a serious dispute. Businesses frequently cannot wait that long to have the legality of their activities tested. Companies can ordinarily adjust to a legal result, but cannot plan for indecision. Nor can ghetto dwellers tolerate rat-roommates for long periods of time while the courts ponderously move towards the ultimate order, affirmed on appeal, directing the slum lord to take action. While judicial philosophers and professors argue over whether there is a lawsuit crisis, the average observer comes to his or her own conclusion with a practical approach similar to that of former Justice Potter Stewart's description of pornography: "I know it when I see it."

Some scholars argue that increases in the number of lawsuits do not demonstrate an over-litigious America because

statistics in the short run in some courts indicate that the increase in filings merely parallels the increase in population. By quoting other statistics, different scholars disagree.

Who is right? Taking a larger slice of history tends to show that courts are being used more and more. For example, from 1975 to 1984 (nine years), filings in the district court increased by 70.7%, and in the United States Court of Appeals by 89%. This trend is equally noticeable in the state courts where appeals doubled in the ten-year period from 1973 to 1983, growing at a rate ten times faster than the population.

Nor do these raw numbers tell of the problem's dimensions. Cases now are more complex. Class actions, huge antitrust cases, and managing prisons and mental hospitals are a constant menu. Courts are called upon to deal with issues having moral overtones such as the right to life, the right to die, and genetic engineering. All of these put great stress upon the court and result in judge power drain.

In the vintage years of Learned Hand, a three-judge panel on the Second Circuit would decide approximately 125 cases per year. In 1982, that had risen in the Second Circuit to 237 -- an increase of 90%. Is it any wonder that there are so few "Learned Hand" decisions?

Two years ago, I made an effort to update my analysis of the original Working Paper and presented it to the Conference on the Judiciary at Williamsburg, Virginia, in March 1985. A copy is attached to this statement. I conclude that it is even more important now than it was in 1982 that the Senate enact this legislation and do so as soon as possible.

A question has arisen again, as it has before, of why we need a commission. Some grant the critical need to study the courts but ask why a presently-existing body cannot deal with the challenge. My answer is the same one that I made two years ago when the question was asked. At that time, I stated:

> A commission could bring together all the studies and, shedding preconceptions, make objective recommendations. Academic efforts generally are isolated. Broader-based efforts, such as the Civil Litigation Research Project or the ongoing work of the Rand Institute for Civil Justice, still do not aim toward a plan for future needs. The Federal Judicial Center and the Administrative Office of the United States Courts do not have a mandate for such comprehensive planning and, particularly with the Administrative Office, must allocate most efforts to servicing the courts.
>
> Moreover, none of these groups has the political participation to give any plan derived from its research the imprimatur for successful implementation. As Judge Haynsworth explained: "Reform in the administration of justice is a fragile thing, easily wrecked by stout opposition from even a small handful or two of respected or influential persons." P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal 223 (1976) (quoting Judge Haynsworth).

It seems clear to me that, when dealing with such a delicate question as how our judicial system is to be modified, without the political component, any study is doomed to be essentially a dust-gatherer. The great benefit of the three-branch commission is that it has the two branches needed for action: the legislative and the executive. It may well be that the Administrative Office of the United States Courts and the Federal Judicial Center can provide resource data, and that judges may well be in the best position to predict the needs of the courts, but it is only through the response of the political branches that action occurs. A three-branch commission is thus an indispensable part of the equation to solve the problem.

Can it be that enough is known already about the problem, and no commission is needed for a study? If the answers were known, concrete solutions would be proposed to the Senate rather than a proposal for a study commission. We must look

downstream for a decade or two to secure a vital perspective of where the courts are going on their present course, and what changes are required so that the courts can meet the future needs of our country. Once that perspective has been established, the three-branch commission will be in a position to make annual reports to the Congress, recommending what is needed that year to solve the current problems, as well as to make progress towards solving the problems the courts will face in the future. In short, the problem will be attacked in a businesslike way with proper planning and implementation.

But what of the cost? At a time of Gramm-Rudman-Hollings, can we afford a commission? I suggest that with the critical nature of the subject matter, the question is better phrased, how can we not afford a commission? The costs would be relatively minimal. A small staff is anticipated with research work contracted out as needed. The primary responsibility of the commission initially would be to bring together all of the studies which have been completed, to arrange for additional needed research, and to develop one meaningful plan which will provide a blueprint for the future of the judiciary. The commission will have an opportunity to make annual recommendations, and at the end of the sunset period (10 years), it will have proven its merit or will disappear.

But will there be savings to offset this minor investment? I suggest that there will be. Currently, we provide a band-aid approach to court problems which are at best inefficient and probably cost more than incremental improvements to meet long-term needs. One year money may be spent on a temporary lean-to which we later determine was unnecessary. Without long-range planning, inefficient expenditures are bound to occur.

In addition, the response so far to the added caseload has been a horizontal increase in judges. There is no question that this is expensive. I have been advised that the average

annual cost for an existing district judgeship, including salary and benefits for the judge and his staff, and a fair allocation of his overhead for courtroom facilities, is $479,000. For a judge of the court of appeals, it is $483,000. The implementation of commission recommendations that result in not having to add a few judges would more than offset the cost of the commission. In the long run, I suggest, it may well be that the cost of the commission may be the best investment the government will have made in this decade.

I am pleased that the Subcommittee on Courts is once more reviewing this critical issue. I hope the Senate will take action this session.

THE FUTURE OF THE JUDICIARY -- AN UPDATE

by J. Clifford Wallace*

Presented to the Conference on the Judiciary
Williamsburg, Virginia, March 1985

Nearly five years ago, Chief Justice Burger asked me to predict and consider the problems that may confront the judiciary in the year 2000 and beyond. With the help of numerous books, reports, articles, and informal consultations with a number of leaders in and out of our profession, I wrote a working paper assessing the problems I foresaw and calling for the creation of a commission to study them in-depth. See Wallace, Working Paper -- Future of the Judiciary, 94 F.R.D. 225 (1981) (Working Paper). I reported my findings to this Conference in February 1981.

Although the response to my paper was essentially positive, there has been no immediate reform. I did not seriously expect instant action, however. As Chief Justice Arthur Vanderbilt has pointed out, working toward judicial reform is not for the short winded. Now that we are four years down the road to the year 2000, however, it seems appropriate to offer some further thoughts on this matter.

I. CURRENT STATISTICS

A. Increasing Caseload

According to the best available data, the daily business of the federal courts continues to increase. There were 31,490

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cases filed in the federal courts of appeals during 1984.[1] Administrative Office of the United States Courts (AO), Federal Court Management Statistics 1984, at 15 (1984 Statistics). This is an increase of 35.7% over the caseload at the beginning of 1981 when I prepared my original working paper, see id., and 65.8% over 1978, when the number of circuit judgeships was greatly increased. See AO, Federal Court Management Statistics 1983, at 15 (1983 Statistics). (Of course, the 1984 increase is not reflected.) The number of open judgeship months has been reduced, however, to below the 1978 level. See 1984 Statistics, supra, at 15; 1983 Statistics, supra, at 15.

A similar trend exists in the federal district courts. There were 285,563 cases filed with the district courts in 1984, see 1984 Statistics, supra, at 129, up 51.5% from the level when I prepared my original working paper. See id. This is also an increase of 70.7% from the 1978 level when the number of judgeships was substantially increased. See id.; 1983 Statistics, supra, at 129. The number of open judgeship months has been reduced to below the 1978 level. See 1984 Statistics, supra, at 129; 1983 Statistics, supra, at 129.

B. Handling the Increase

Despite the ever increasing caseload, the federal courts have largely been able to dispose of the recent cases coming before them. For example, in the courts of appeals, the median time from filing to disposition has remained relatively constant between 1978 and 1984. See 1984 Statistics, supra, at 15; 1983

Statistics, supra, at 15. The low was 8.0 months in 1978; the high 9.3 months in 1981. See 1984 Statistics, supra, at 15; 1983 Statistics, supra, at 15. The 1984 level of 8.3 months was slightly below the 7-year median of 8.6 months, see 1984 Statistics, supra, at 15; 1983 Statistics, supra, at 15, and equal to the 16-year median since 1969, which period saw a low of 6.4 months in 1973. See 1984 Statistics, supra, at 15; 1983 Statistics, supra, at 15; AO, Management Statistics for United States Courts 1977, at 13 (1977 Statistics); AO, Management Statistics for United States Courts 1974, at 13 (1974 Statistics). The number of pending appeals per panel has also remained fairly constant in the recent past. The low was 408 in 1979; the high 518 in 1984. See 1984 Statistics, supra, at 15. But the longer trend from 1972 is telling: the low was 285 in 1972; the high 518 last year. See id.; 1977 Statistics, supra, at 13.

The district courts have similarly maintained their ability to dispose of cases despite an increased total caseload. The median time from filing to disposition in civil cases has declined from 10 months in 1978 to 7 months during the last three years. See 1984 Statistics, supra, at 129; 1983 Statistics, supra, at 129. The median had held at 9-10 months between 1969 and 1979. See 1984 Statistics, supra, at 129; 1983 Statistics, supra, at 129; 1977 Statistics, supra, at 127; 1974 Statistics, supra, at 120. See also Clark, Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century, 55 S. Cal. L. Rev. 65, 81 (1981) (decline between 1900

and 1980 from nearly 4 years to about 1 year). The median time from filing to disposition in criminal cases, however, has risen somewhat from 3.2 months in 1978 to 5.0 months in 1984. See 1984 Statistics, supra, at 129; 1983 Statistics, supra, at 129. The median time between 1969 and 1977 had also risen slowly from 2.5 months to 3.7 months. See 1977 Statistics, supra, at 127; 1974 Statistics, supra, at 120. But criminal filings remain a relatively small proportion of the workload. See 1984 Statistics, supra, at 129 (approximately 8% of total caseload). Finally, the percentage of civil cases over 3 years old has declined from 10.2% in 1978 to 6.3% in 1984, see id., the lowest percentage achieved in recent history. See id.; 1983 Statistics, supra, at 129; 1977 Statistics, supra, at 127; 1974 Statistics, supra, at 120.

C. Nonproblem or Crisis?

Some critics have interpreted these statistics to mean that although the total caseload is rising, it is not creating a problem that the current level of judges cannot control with tenaciousness and hard work. These critics question the "popular perceptions of a system in crisis," Edwards, The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies, 68 Iowa L. Rev. 871, 878 (1983), as exemplified in The Litigation Explosion (1984) (booklet of articles reprinted from L.A. Times). They also tend to discount arguments that our society is overly litigious. See Edwards, supra, at 898; Galanter, Reading The Landscape of Disputes: What We Know and Don't Know (and Think We Know) About

Our Allegedly Litigious Society, 31 U.C.L.A. L. Rev. 4, 36-61 (1983).

Other critics, however, believe that volume has become a problem. For example, Dean Ernest Gellhorn suggested last year that there is a relationship between the increased volume and the flood of lawyers entering the profession, and then observed:

> The number of lawyers in the U.S. has risen to about 650,000 today from 350,000 in 1970 -- and it threatens to reach one million sometime during the 1990s. Two-thirds of the world's lawyers now practice in this country, and one-third of these were graduated during the past five years.
>
> The number of law students doubled between 1960 and 1970 and increased an additional 50% (to 125,000) by 1980. More lawyers joined the legal profession in the 1970s than in the previous 100 years.

Gellhorn, Too Much Law, Too Many Lawyers, Not Enough Justice, Wall St. J., June 5, 1984, at __, col. 3. The Chief Justice has emphasized the high social cost of increased litigation, reporting that in 1982 taxpayers spent $2.2 billion to process more than 8 million civil lawsuits and $4 billion to process criminal cases. W. Burger, 1983 Year-End Report on the Judiciary 15 (1983 Report). Professor Daniel Meador refers to the current state of affairs as "the crisis of volume." Meador, Appellate Courts: Staff and Process in the Crisis of Volume (West 1974). Others have emphasized that the increased volume of cases results in greater court visibility, that the cases are more complex, and that they involve a wider range of problems than in the recent past. Wheeler and Levin, The American Judiciary: Critical Issues,

Annals Amer. Academy Pol. & Soc. Sci., July 1982, pp. 9-10.

Statistics, of course, cannot tell us whether our society litigates too much, too often, or too expensively. See generally Olson, Opening Statement, Litigation, Summer 1982, at 1 (collecting comments objecting to current levels of litigation). Compare W. Burger, 1983 Report, supra, at 17 ("growing caseloads, delays, and increasing costs" of litigation) with Clark, supra, at 86-87 (terminations per district court judge have varied from 198 to 930 per year between 1900 and 1980; the range in the 1970's was only 338 to 433 per judge); id. at 81-82 (showing a decline in the duration of civil cases and a partial decline, then small upturn, in the duration of criminal cases); Trubek, Sarat, Felstiner, Kritzer & Grossman, The Costs of Ordinary Litigation, 31 U.C.L.A. L. Rev. 72, 123 (1983) ("from the litigant's point of view, most ordinary litigation is cost effective."). Such determinations are inherently value judgments.

But the recent trend showing the federal courts' ability to dispose of the increased number of cases coming before them is largely explained by the 1978 increase in the number of federal judgeships and the ability to bring the new judges "up to speed." See, e.g., 1984 Statistics, supra, at 15, 129 (vacant judgeship months has decreased). Therefore, these statistics support my original projection that significantly more judges will constantly be needed to maintain current levels of efficiency. See Working Paper, 94 F.R.D. at 227-28. I warned then of "an inordinate horizontal increase in the court system." Id. at 228. I voice

again the concern that in the long run, continuing to add more judges is not a proper solution.

Moreover, although the federal courts have thus far been able to dispose of their larger number of cases, there is only scant empirical data focusing on whether they have sacrificed quality in doing so. Cf., e.g., Hoffman, Nonpublication of Federal Appellate Court Opinions, 6 Justice Sys. J. 405, 408 (1981) ("Critics of nonpublication . . . have posed a range of concerns that are largely qualitative . . . empirically supported more by anecdotes than by statistics."). The commission I proposed in 1981 could focus on and answer this question. Conducting research would be one of its primary functions.

II. THE PROPOSED COMMISSION

A. Positive vs. Normative Analysis

The current debate about what the statistics imply suggests that the proposed commission cannot approach its job by focusing solely on questions such as whether Congress should grant any particular set of statutory rights that citizens may vindicate by litigation, see, e.g., Gellhorn, supra, whether citizens should have meaningful access to alternative dispute resolution mechanisms, see, e.g., ABA, Report of the Pound Conference Follow-Up Task Force 9-18 (1976), reprinted in Hearings on S. 957, Dispute Resolution Act, Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary of the House, 95th Cong., 2d Sess. 298-307 (1978), or whether courts should undertake broad or narrow approaches to

their own work, see, e.g., Posner, The Meaning of Judicial Self-Restraint, 59 Ind. L.J. 1 (1983). See generally Wallace, Working Paper, 94 F.R.D. at 231-34. These questions involve important issues of jurisprudence, federalism, and constitutional theory. The commission may well deal with them, at least in part, but should be structured to remain broad gauge and as nonideological as possible. It was not the designed purpose of the commission nor should it become a vehicle to further a particular ideological view.

B. Positive Questions to Explore

Certainly there are relatively neutral ways in which a commission could determine whether and to what extent we can be more effective in the administration of justice. It is here that individual questions can be placed into the context of future as well as present needs. Thus, questions can be explored in a neutral atmosphere and be a part of a plan for long-term solutions for the judicial system. Two examples may be helpful in analyzing the benefit of the commission.

1. Arbitration Alternatives

The commission could study the feasibility of arbitration as a viable alternative to litigation. Formal civil arbitration wholly external to the court system already thrives. Examples include arbitration conducted by the American Arbitration Association (AAA) and the arbitration panels on the securities and commodities exchanges. A recent study of formal AAA arbitration found it tended to proceed faster than federal civil adjudication,

but that "[o]ne does not save money by going to the AAA" instead of to the courts. Kritzer & Anderson, The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts, 8 Justice Sys. J. 6, 18 (1983).

Formal civil arbitration connected to court systems also exists and has begun to spread widely since its beginnings in Philadelphia in 1952. Examples include court-annexed arbitration in federal district courts and judicial arbitration in California and New York state courts. One critic, commenting on recent studies of these efforts, stated that these forms of arbitration "fail to achieve many of the performance goals posited for them by those concerned with court congestion and cost savings." Pearson, An Evaluation of Alternatives to Court Adjudication, 7 Justice Sys. J. 420, 426 (1982). Nevertheless, it has been reported that there was some increase in the number of cases terminated within one year in two of three pilot districts, chiefly because of settlements. Federal Judicial Center, Evaluation of Court-Annexed Arbitration in Three Federal District Courts 76-77 (1981); id. at 93 (average time savings 2-4 months). See id. ("We cannot determine whether the [court-annexed arbitration] rules will produce a decrease or avoid an increase in the incident of trials."); D. Hensler, A. Lipson & E. Rolph, Judicial Arbitration in California: The First Year 94 (1981) (Rand, The Institute for Civil Justice) ("even the most optimistic assumptions do not lead us to expect significant reductions in the judicial workload with

arbitration."); id. at 95-96 (arbitration saves time in cases where the parties volunteered for it, but in four of six courts studied took longer where ordered by the court for the parties). Obviously, this is a fertile area of study as a possible, partial alternative to a continuing increase of federal judges.

2. Plea Bargaining

Another subject conducive to a relatively neutral study by the proposed commission would be the feasibility of reducing the amount of plea bargaining. In most criminal cases, plea bargaining is necessary and inevitable -- at any rate, that is the view of nearly all knowledgeable scholars and practitioners and much of the public at large." Schulhofer, Is Plea Bargaining Inevitable?, 97 Harv. L. Rev. 1037, 1037 (1984). Some critics have not been wholly enthusiastic about the process, however. E.g., Peterson, A Bad Bargain, Trial, May-June 1973, at 16 ("the process of plea bargaining is not one which any student of the subject regards as an ornament to our system of criminal justice") (quoting Justice Rehnquist). Occasionally, some of these critics have argued that plea bargaining is not administratively necessary. For example, my colleague Judge Alarcon stated in 1975: "I do not believe the court system will collapse under the weight of too many trials if we abandon plea bargaining." Alarcon, Court Reform Would Solve the Problem, L.A. Times, Nov. 9, 1975, § 8, at 5, col. 4.

A recent empirical study conducted in Philadelphia tentatively indicates that, even ignoring potential pretrial

compromises, a 10% reduction in plea bargaining would require only a 3-4% increase in judicial capacity. Shulhofer, supra, at 1085-86. Another scholar suggests that there are a number of methods for further reducing the proportional increase in judicial resources that would be needed. See generally Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 U. Chi. L. Rev. 931 (1983).

C. Why a Commission

A commission could bring together all the studies and, shedding preconceptions, make objective recommendations. Academic efforts generally are isolated. Broader-based efforts, such as the Civil Litigation Research Project or the ongoing work of the Rand Institute for Civil Justice, still do not aim toward a plan for future needs. The Federal Judicial Center and the Administrative Office of the United States Courts do not have a mandate for such comprehensive planning and, particularly with the Administrative Office, must allocate most efforts to servicing the courts.

Moreover, none of these groups has the political participation to give any plan derived from its research the imprimatur for successful implementation. As Judge Haynsworth explained: "Reform in the administration of justice is a fragile thing, easily wrecked by stout opposition from even a small handful or two of respected or influential persons." P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal 223 (1976) (quoting Judge Haynsworth).

An example of a widespread reform effort that has lacked

this political component is the movement to abolish federal diversity jurisdiction. Academics like to argue for its abolition because it would make the law a neater system. See, e.g., Rowe, Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reform, 92 Harv. L. Rev. 963 (1979). Federal judges may favor abolition of diversity jurisdiction as a quick way to cut back expenditure of federal judicial resources. See, e.g., Rubin, An Idea Whose Time Has Gone, 70 A.B.A. J., June 1984, at 16, 18. But practitioners tend to favor diversity jurisdiction, see, e.g., Frank, Diversity Jurisdiction: Let's Keep It, in National Legal Center for the Public Interest, Abolition of Diversity Jurisdiction: An Idea Whose Time Has Come? 21 (1983), and may perceive the federal judiciary as simply trying to shuffle the work into state courts, leaving the justice system as a whole no better off, see generally Frank, An Idea Whose Time Is Still Here, 70 A.B.A. J., June 1984, at 17, 18.

Because these independent efforts have lacked the political component, they have not gotten very far. Congress has entertained numerous proposals to abolish diversity jurisdiction, most recently in a series of bills introduced by Representative Kastenmeier. Scholars have offered creative alternative proposals such as allowing each judicial district to decide whether to continue diversity jurisdiction or not. See generally Shapiro, Federal Diversity Jurisdiction: A Survey and A Proposal, 91 Harv. L. Rev. 317 (1977). Yet no reform has occurred.

If diversity jurisdiction is to be abolished, as I

believe it should be, a small commission with congressional representation is more likely to propose a workable solution than any one of these adversaries. A smaller group could balance any side effects with the benefits of a total plan and provide systematic, integrated answers to basic questions such as whether avoidance of federal jurisdiction will have disproportionate quantitative or qualitative effects on other parts of our justice system. Cf. Solimine & Walker, Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity, 10 Hast. Const. L.Q. 213, 252 (1983) (concluding "there is simply no widespread disregard for the vindication of federal rights in state appellate courts" thus supporting a theory of relative parity in quality). The commission would provide helpful and effective information and suggestions to reform this and other administrative problems. Most important, it could do so in the context of meeting the long-term needs of the judicial system.

III. LEGISLATION

Progress is currently being made toward establishing a broad-based study group composed of a small but diverse membership. In the 97th Congress, Senator Heflin introduced S. 1530 which incorporated the proposal suggested in the Working Paper. Later, Senator Thurmond, together with Senators Heflin, DeConcini, Simpson, East, and Nunn, introduced S. 675, which contained a modified version of the proposal based on the same principle. That bill was passed by the Senate, but no action was taken in the House.

In the 98th Congress, Senator Heflin introduced S. 381, a bill almost identical to the partially successful S. 675. The Senate Judiciary Committee approved it in June 1984. S. 381 would establish a Federal Courts Study Commission on the Future of the Federal Judiciary. The commission would have a lifespan of no more than 10 years (although a permanent commission might be preferable), and it would consist of 14 members, some appointed by the President, some by the House of Representatives, some by the Senate, some by the Chief Justice, and some by the states' Conference of Chief Justices. Part of the commission's mandate would be to "develop a long-range plan for the future of the Federal judiciary." S. 381, § 2(b)(6). The commission could not only bring together the many studies of subjects within the commission's jurisdiction, but could also draw on the expertise of the Administrative Office of the United States Courts, the Federal Judicial Center, its own staff, and private persons and institutions. Thus, the commission would have the personnel, the mandate, and the capability to plan effectively for the future.

IV. CONCLUSION

We are moving in the right direction and should continue to do so. The Chief Justice of the United States has signaled the importance of the planning problem. In his 1981 Year-End Report, Chief Justice Burger called for an "agenda" for the year 2000. He stated:

> Those of us whose duty it is to administer justice have to ask ourselves if we have sufficiently anticipated and made provision for the consequences which flow from . . . transformations in our legal justice system.

W. Burger, Year-End Report on the Judiciary 30 (1981). Concerning the predecessor to S. 381, the Chief Justice said:

> The basis for one such study is already "in the wings" in Senate Bill S. 675. That bill, which passed the Senate on October 1 of this year, would establish a three-branch, bipartisan commission consisting of fourteen members to study the federal and state court systems and recommend improvements. In addition to evaluating current problems facing the courts, that study should also develop a long-range plan for the future of our judicial systems. The long-range plan should include assessments involving alternative methods of dispute resolution, the actual structure and administration of the federal court system, the manner in which courts handle cases, and new methods of resolution of conflicts among circuits.
>
> Enactment of this pending legislation would be one step in the right direction.

Remarks of Warren E. Burger, Chief Justice of the United States at the Arthur T. Vanderbilt Dinner, Nov. 18, 1982, at 13 (sponsored by N.Y.U. and the Institute of Judicial Administration). The Chief Justice reiterated his interest in reform by making the following recommendation in his 1984 Year-End Report:

> Create Federal Courts Study Commission. The caseload problems of the lower Federal Courts are no less real, but they are of less clear solution. Consequently, I renew my call for Congress to establish a three-branch study commission to inquire and report on the future needs of the Federal Court system. I agree with the sentiment expressed in a September 18, 1984, letter written to me by Senator Strom Thurmond, Chairman of the Senate Judiciary Committee: "Too often, we only have time to address specific problems as they arise without giving adequate consideration to the overall functioning of the courts and to problems which may arise in the future."

W. Burger, 1984 Year-End Report on the Judiciary 10. Perhaps in this session of Congress, a bill establishing the critically needed planning commission can be enacted.

Senator HEFLIN. I believe we will continue with Professor Levin. Then we will ask both of you some questions.

STATEMENT OF A. LEO LEVIN, DIRECTOR, FEDERAL JUDICIAL CENTER, TESTIFYING IN AN INDIVIDUAL CAPACITY

Mr. LEVIN. Thank you, Mr. Chairman. I am indeed grateful to you for those earlier comments and for the privilege of being here before you, Senator Grassley, and Senator Heflin.

As has already been pointed out by the chairman this morning and earlier in introducing this bill—and I think Senator Grassley underscored this as well—the quality of our judicial system really determines the quality of life in this country. We are all in agreement on that, and the problem is how to go about making an affirmative impact.

What this bill does is assign top priority to the study of jurisdiction of the Federal courts. Traditionally, jurisdiction has been a matter of congressional action, with congressional initiative and interests subject to executive review, and clearly the judiciary is interested in jurisdiction and would like to have an input.

Thus, the concept of a tripartite group, a group representative of each of these three branches of Government to deal with this topmost priority as identified in the bill seems to me to be particularly appropriate. It is a concept approved by the Judicial Conference and I am optimistic that this will result in the commission's more than paying for itself. I applaud that focus, that priority, and I move on to some other questions.

Let me address the matter of alternative dispute resolution. Because it has been put forward so well by Senator Grassley, apart from the significance of other aspects of the bill, let me talk of the role of the Federal Judicial Center and alternative dispute resolution. Right now, as a result of the appropriation process, there is in place in 10 separate Federal courts pilot projects in court-annexed arbitration.

We are studying these pilot programs because of the interest of the other body, looking forward to authorizing legislation beyond just the way it has been working up to now by appropriation. My hope would be, and this bill so provides, that to the extent that we have done any work, there is no need for the commission to duplicate it. Reinventing the wheel, or anything like that, is not desirable.

What there is of our work, it is public; it is available. What is useful, one utilizes. Of course, programs change, and the pace of improvement has not stopped, and restudy is sometimes appropriate. I referred only to pilots in court-annexed arbitration. There is interest in other courts in this and in other mechanisms as well. What is more, I had the privilege—I recall vividly today—of discussing court-annexed arbitration in the Eighth Circuit Judicial Conference—I have a lot of friends in that general area and it was my good fortune to start out in Iowa—and there is interest there—even in places which do not have urban crunch.

What has really developed today is that of every 100 civil cases terminated in Federal courts, only 5 of that 100 have a trial even begin. That includes jury trial or bench trial; 95 out of the 100 are

terminated in some other way and, in our judgment, a very large percentage of those terminations are by what is called settlement, or dismissal which is a result of alternative dispute resolution mechanisms that have worked.

But, as has already been pointed out by Judge Wallace, a lot remains to be considered. The Congress has expressed interest in our looking at alternative dispute resolution. The judges have expressed interest. There is a lot more to be done. Some work is going on now, and I am fairly confident that there will not be unnecesary duplication, that where one can draw on what has been done, one will do so.

There are other courts which have used other mechanisms. We have done descriptive studies on such programs; they, too, are available. Again, there is more work to be done. The budget limitations—I am not complaining—are significant and limit our efforts somewhat.

There is another factor in this bill which I applaud. It draws on the notion of utilizing interagency agreements where appropriate, where it becomes efficient and effective. And the Federal Judicial Center is identified by name in the bill in more than one place.

If it should be determined that utilizing what the Center has in place—including our staff—an interagency agreement can be more efficient, more economical, more effective to do X piece of work or Y piece of work, in my judgment that is what would happen. The results would be fit into the whole mosaic of an overall plan, something that looks to the future, as Judge Wallace has so eloquently described. I forecast that the Center would be delighted to participate that way.

We have never viewed any penny, any nickel, as expendable because only a small amount is involved. But I think in the long run this commission is likely to be cost-effective, and particularly with the heavy emphasis on the priority being jurisdiction.

Now, as I point out in my statement—and if it is appropriate I hope it can be introduced in the record—there are certain subsections that give me a little pause. They are not crucial, although I think there is a risk of a few of them being misread. I simply feel the obligation to flag them for such consideration as will be given to them, things that could give the impression of assessing, for example, the quality of personnel in the Federal judicial system, and that is section 2[B][2]. There are one or two others on the method by which courts decide cases.

My general reaction is that this bill has the potential of making an exceedingly important contribution to the future of the Federal judicial system and for that reason I consider it truly a privilege to come here and to state this position and to attempt to respond more specifically to any questions you may have.

Thank you.

[The statement of Mr. Levin follows:]

TESTIMONY OF A. LEO LEVIN

My name is A. Leo Levin, and I serve as Director of the Federal Judicial Center, although I should note that I will be retiring on July 31 of this year. As you know, on matters of policy, the Center speaks only through its Board; any opinions expressed herein are entirely my own.

The proposal to create a study commission appointed by the leadership of the three branches of government has been approved by the Judicial Conference of the United States. I was privileged to appear before this body at the March 11, 1983 hearings on a predecessor bill, S.645, and took occasion at that time to testify in favor of the proposal. I am here today to reiterate my view that this basic concept deserves to be implemented and that inherent in it is the potential of a major contribution to the well-being of the federal judicial system.

It is useful to underscore certain major premises, expressed so eloquently by the Chairman on the occasion of his introducing the present bill. At that time, Senator Heflin stated, "There is no doubt that orderly and effective administration of justice is the key to ensuring the life, liberty and happiness of all Americans. Our constitutional freedom is premised on certain assumptions: one is the belief that our judicial system will serve the needs of every individual."

In addition, the ability of our courts to function smoothly and the freedom we enjoy as citizens of this country was also underscored by Senator Heflin at that time. Thus, the underlying motivation for the creation of this Federal Court Study Commission is nothing less than concern for the quality of life in our society. Issues of this significance

deserve attention by a group representing the perspectives of each of the three branches of government.

A tri-partite commission is particularly appropriate with respect to the study of the jurisdiction of the courts which, pursuant to Section 5 (b) "shall be given priority over the other functions and duties being carried out by the Commission."

This point deserves elaboration. Under our system of government it is for the legislature, with appropriate review by the executive, to determine the jurisdiction of the federal courts, and it cannot be doubted that the judicial branch should have its views considered on matters of jurisdiction. Accordingly, a tri-partite commission can be a useful mechanism. Moreover, I am pleased that the legislation envisions concern with the administrative process, for in a very significant sense how such tribunals are organized affects the proper scope of judicial review and a number of jurisdictional choices associated with it.

I believe that the term jurisdiction as used in the bill is intended to be interpreted broadly rather than narrowly. Questions of venue, e.g., forum non conveniens and appropriate venue for corporations doing business in a large number of states, are closely related both to technical and to conceptual problems of jurisdiction.

I should note, for the sake of completeness, that the Judicial Conference of the United States endorsed the concept of such a study commission so long as it was not created as a permanent entity. This is taken care of in the present bill. Finally, the Conference specifically urged the Congress not to delay enacting jurisdictional reforms that had earlier been endorsed by the Judicial Conference after adequate

study; there is nothing in the present legislation that goes contrary to that proviso.

I must confess some concern over the charge to the commission to evaluate the personnel of the federal courts (Sec. 2 (b)(2)). The same subsection refers to evaluating the procedures of the courts. I do not know what is envisioned. However, I note that this provision is not to be found in a number of predecessor bills and it gives me pause, although I heartily endorse the provision that calls upon the commission to "examine problems currently facing the courts" (Sec. 2 (b)(3)). I think I should add that I do not believe that the Judicial Conference of the United States or any of its committees had occasion to examine this particular subsection and to express its views concerning it. I might express similar concern about the commission assessing "the manner in which courts handle cases." (Sec. 2 (b) (6)(C)).

There are other provisions that deserve particular praise, for example, the development of long-range plans for the judicial system. I note, too, that the annual written reports on the condition of the judiciary (Sec. 5 (a)(5); see also Sec. 7 (a)(1)), are to go to the President and the Congress, although neither to the Chief Justice or to the Judicial Conference of the United States. This is probably an oversight.

I understand that questions have been raised as to whether or not the Federal Judicial Center could substitute for the proposed commission. As indicated above, I believe that a tri-partite commission is better suited to dealing with questions such as the jurisdiction of courts. I do believe that the Center could undertake some other duties mentioned in the Act. It is relevant that because of the interest of the other body, we are currently engaged in

empirical studies of the operation of some alternative dispute resolution programs specifically mentioned in the bill. However, I would assume that the commission would not unnecessarily duplicate work already completed or in progress. Moreover, the bill provides, wisely in my view, for interagency agreements that make it possible for certain work to be done by the Federal Judicial Center on behalf of the commission. I am optimistic that where there this is likely to be useful, the commission would call upon the Center as envisioned by the statute.

I am confident that the Federal Judicial Center would consider it an honor and a privilege to be of assistance in this important undertaking, one which holds such great promise for the future of the federal judicial system.

Senator HEFLIN. Thank you, Professor Levin.

My chief counsel wanted to remind me that you are testifying on your own behalf and on your own opinion rather than representing the Board of Directors of the Federal Judicial Center.

Mr. LEVIN. Thank you, Mr. Chairman, yes.

Senator HEFLIN. We appreciate it.

Judge Wallace, there has been some concern raised that the study commission could be used as a vehicle for limiting the jurisdiction of the Federal courts based on ideological premises similar to some of the court-stripping bills that have been introduced. It is certainly not my position and my intention that this legislation be used in that way.

Would you direct yourself to your thoughts pertaining to this?

Judge WALLACE. Certainly, Senator. I must say at the beginning that the "court-stripping" idea was never in the initial planning or even considered in my initial recommendations that I made to the Chief Justice of the United States. I think it is a question that has been raised by individuals who are looking carefully at whether or not there is some underlying, hidden agenda involved in this commission proposal.

I can assure you, Senator, that that was not my idea. My concept was to grant this study commission broad enough jurisdiction so that it could deal with all of the problems that must be considered. If an effort is to be made to determine the nature of a justice system in the year 2000 in order to meet the needs of the citizens of this country, a broad mandate for the commission is necessary.

Now, whether the word "jurisdiction" or some other term is used, it makes no difference. Perhaps there is cautionary language that can be inserted.

But let me indicate from a practical point of view why I do not believe this is a problem. I said initially that there are reasons why the three-branch commission is the best approach. The bill calls for appointment of two Members of the Senate and two Members of the House. The bill also requires that the two Senators and the two Representatives must not be from the same party. So not only are there the perspectives of the Senate and of the House, but no one party can have a majority of the legislative representatives. With two Senators and two Members of the House representing both major parties on this commission, I suggest to you from a very practical point of view that unless all four of them are unanimously in favor of a recommendation, the recommendation will not go any further than the hopper. And I hope that those who would be appointed by the leadership of the House and of the Senate would be the types of individuals who would be alert to these kinds of problems.

My judgment is that this should be a neutral commission that has no hidden agenda. The appointed Senators and Members of the House will be in the best position to make sure its recommendations are appropriate. If any improper commission recommendation were presented to the Senate or to the House, I am confident it would be blocked, if even one of the legislative members of that commission opposed it because of a belief that it included improper "court stripping."

Thus, having the three-branch commission include Members from the House and the Senate, I suggest, is a fail-safe protection so that any inappropriate recommendation would be discovered and eventually would be discarded. If this does not satisfy the person raising the question, then language should be put into the bill to provide protection. I think, from a practical point of view, the problem simply will not arise.

Senator HEFLIN. Professor Levin, you raised concern in your testimony about one of the stated purposes of the study commission, which is to evaluate procedures, personnel, business and administration of the court. I assume your hesitation is based on the fear that the commission might somehow interfere with the workings of the Judicial Conference or the Administrative Office of the U.S. Court.

That is certainly not my intention in regard to this legislation. Do you have any suggestions that might alleviate this concern from the outset?

Mr. LEVIN. Senator Heflin, I think, very frankly, the stature, the reputation of the one who is sponsoring it and introducing it in the Senate, is such that I do not think that that would be widely perceived as a big problem. On the other hand, I felt obligated to mention it because it may cause some concern within the judiciary. I think this is a matter that would merely require some verbal changes or a legislative record that could be handled on the staff level with the approval of the Senator and the chairman.

I think that could obviate the difficulty, and I have not attempted to redraft. I do not view it as serious. It does not take away from my unstinting admiration, both of the concept and the persistence in moving the act forward. But I did feel the obligation to mention it and I think that a legislative record and maybe a touch of verbal

change here and there—maybe one subsection out that was not in previous bills would more than suffice.

Senator HEFLIN. Well, I think you raise a valid question. I do not think that the commission ought to get into the evaluation of personnel, but I think probably the intent in drafting it was to look to the standards pertaining to the selection, hiring, and retention of personnel rather than an attempt to evaluate individuals.

Now, this commission is not designed to be in competition with existing organizations. Senator Grassley raised this. There is the Judicial Center, of which Mr. Levin is the Director, as well as the Administrative Office of Courts and the Judicial Conference.

How do you see this study commission working in relationship with but, nevertheless, not invading the province of, each of those existing entities?

Mr. LEVIN. Mr. Chairman, I really see no basic problem. I think with the proper personnel they would utilize those resources that exist. They would take as their primary function the long-range planning, the concern with structure. The bill wisely says that they should look at the administrative dispute resolution process.

I heard a former official person—I think an administrative law judge—of the Social Security Administration—say to a group that the tendency was, if not the uniform practice, to deny every claim to start with and wait until it bounced again. Well, the key is going to be to look to see that the administrative processes are working well, and that would affect judicial review. Improvement might cut down the need for a certain number of article III judges and effect economies. I think the study commission would work well with all of the existing agencies, with the emphasis on judicial jurisdiction. Where the Congress would ultimately have to act, long-range planning is needed. And doing the groundwork for this in as economical, efficient a way as possible, yet assuring the validity of "the product", is essential.

Senator HEFLIN. Senator Grassley, do you have any questions?

Senator GRASSLEY. Yes. Let me take over right there where you just responded, Professor Levin, to the chairman's question and say that I do not question but what you are saying is well-intended and sincerely so, but in your own statement I think you leave some doubt about whether or not there would not be duplication.

On page 4 you say, I do believe that the Center could undertake some other duties mentioned in the Federal Courts Study Act. If there are some other duties mentioned in the act that the Center conceivably can do now, there would be opportunity for duplication there?

Mr. LEVIN. Senator, my thought was that as this tripartite group is moving forward on a number of matters, they might desire to call upon the Center to do some of the things that they would want to consider, some of which may already have been done.

Senator GRASSLEY. But contrariwise, then, are not there some things in the act that your Center can already do right now?

Mr. LEVIN. Senator Grassley, I think the answer has to be yes. Some of the things we are doing, such as alternative dispute resolution evaluation, would be of value to a study commission. I think even these things would also benefit from careful look by a tripartite group. Of course, we are very limited in resources, we are lim-

ited in how much we can do. I really have the feeling that coordination could be worked in a way that the efficiency would be near optimal.

I think you need this study commission because the planning and accompanying research ought to be done with the participation of the Congress from the beginning. For jurisdiction, for example, it is important to take a careful look at a better way to do the administrative decisionmaking—I am talking only about processing cases. Then it could be determined by people of good will what is the most efficient, effective way of providing such related procedures as judicial review.

I think some research ought to be done by the commission. I think as to some studies the commission will ask, are you people already doing it, and I think in some instances we will say yes. In others we have to pass on the invitation to participate. In others the work will be divided. That is my vision.

Senator GRASSLEY. Well, I think your answer is legitimate and the point of a hearing like this is it brings some of these potential problems out. If there is something there that unnecessarily leads to duplication, perhaps the legislation can be tightened up just a little bit. Because as long as we know that there is not any desire here to be duplicative, then I think that solves our problem.

I think maybe, Judge, you would be the one I should ask this of, but if Professor Levin wants to respond, that is OK as well.

We have not dealt with the issue of how the commission goes about making recommendations. I suppose the very least it is going to be by majority vote. But I would think that achieving consensus as much as possible is critical to the success of any commission and particularly with respect to the weight the commission's recommendations will have when the Congress has to deal with them.

Now, I think immediately of the debate over the Sentencing Commission's recommendations. I think that shows what happens when we do not have consensus. And so I guess maybe I would want to—maybe it is not fair to compare this to the Sentencing Commission—but just using that as a backdrop, how would the proposed commission avoid pitfalls where consensus is so important?

Judge WALLACE. Senator, that is an excellent question. I think we should consider how this commission would be different from the Sentencing Commission. The Sentencing Commission is attempting to accomplish its purpose right away. It is attempting to do so in a very complicated area. I am well aware of those complications, because I have been a district court judge and have sentenced convicted defendants.

The difference in this bill becomes apparent when you consider that it has two phases. The first phase is to conduct a long-term study. For the first 2 years, it is anticipated, the commission will deal with no current problems and will make no recommendations. It will concentrate on what changes need to be made in the next 10 or 20 years. That is, it would bring together all of the various disciplines to determine what the needs of the court system are downstream.

That blueprint of the future of the judiciary is something that is fairly objective. It is controversial only in the sense that it will deal with data that could be interpreted differently. But, the commis-

sion could decide from the data at least the types of changes will be needed for 20 years hence.

The second phase, the annual recommendations to Congress, would be an implementation towards that downstream goal, and necessarily, there would be a consensus among the commission members as to what the priority items are which should be acted upon that year. It would be the lowest common denominator of all viewpoints. But that is the safest recommendation. In other words, the consensus of the commission members would be important because not only would the judges indicate what they believe the problems are, but the leadership of the Congress and the leadership of the administration would make a value decision based upon priority and acceptability.

So, the recommendations would go forth not only with the assent of Congressmen and Senators who have assessed and understood the situation and the mood of the Congress, but with administration representatives who have also made the same determination. My judgment is that this would result in a more neutral outcome than sentencing recommendations.

My confidence on this issue is increased because judicial administration is essentially a neutral topic. For example, I have been working for the last 4 years with judiciaries in Asia. I spend my vacations there at the request of a foundation with which I work. I am now working with 14 countries, trying to help them improve their judicial systems and eliminate their backlogs. Generally, backlogs are very large in Asia.

It is interesting that I can work with judiciaries in Communist countries and Socialist countries, as well as in countries with systems more similar to ours. I have found that the court system is a neutral area, and we are able to interact on issues involving judicial administration. When all we are trying do do is to make the court machinery work more effectively, the issues are essentially neutral.

My guess is that 90–95 percent, perhaps, of the recommendations that will be made by this commission, will be neutral. This is because the commission will have already looked downstream, and the commission will be working from a blueprint. This, together with the neutralizing force of member interaction that will occur within the commission, will result in recommendations not as divisive as those at the Sentencing Commission.

I am not sure that is a satisfactory answer, but it is my perception of what will transpire.

Senator GRASSLEY. Well, my question is asked in light of the fact that you have two Members of the Senate and two Members of the House, let alone all of these other people that are going to be appointed, and you find very few people of the caliber that would be appointed that are not people of strong convictions and strong philosophies and strong points of view. How would they personally go about doing some of the things that this commission is set up to do if they had the power to do it on their own. Well, I think you have answered my question.

I do not know whether you want to comment, Professor, or not?

Mr. LEVIN. Well, thank you, Senator Grassley, for the opportunity. I would just say that I think an awful lot is going to depend on

the quality of the people. If I had a choice between someone who knew the subject inside out but was already firmly committed that salvation is down a particular road, versus somebody else who was open minded, flexible, willing to listen, willing to compromise, willing to achieve something that is practical and doable, I would take the latter.

I really feel that the hope lies with the people who realize that the problem is serious enough, let's get a solution that we can agree upon. But the risks you point out, Senator, are there. I am optimistic that when the problems are perceived as serious enough, the solutions will come about.

Senator GRASSLEY. One last question. This deals with another aspect that we have asked the commission to study, and that is the large Federal caseload. I would like to know to what extent do you believe that judicial interpretation of statutes are part of the problem? For example, if you would just take one statute, 42 U.S.C. 1983, the courts have taken a narrow law and turned it into a wide ranging one with respect to new Federal court causes of action and relief.

Should the commission study the incidence of overreaching by the courts and make recommendations?

Judge WALLACE. My judgment is, Senator, that the commission should have that on its agenda. It seems to me that any time the courts interpret a statute differently from what the Congress had in mind, it is not only appropriate, but it seems to me a responsible position, that the Congress should amend the statute to clarify the issue.

Senator GRASSLEY. And you are saying that it is legitimate then for the commission itself, if it wanted to, to make recommendations in that area?

Judge WALLACE. I am.

Senator GRASSLEY. Professor?

Mr. LEVIN. I think where a statute is passed by the Congress, and where the problem is that the courts are perceived as wrongly interpreting that statute, I would be far happier if the Congress would take the initiative in amending it. The Congress has the total prerogative, the right and the obligation, to amend it through the legislative process.

I do not know that we need to involve a lot of the judges or a lot of the public in that kind of thing. I think frequently the courts say, this is a statute and we are interpreting it in this way, and the courts will add that it is for the Congress to decide whether the Congress wants to amend the statute.

I am not minimizing the problem. I have heard some great men from within the judiciary say it is a serious problem. But I think a direct approach by the Congress to make perfectly clear what is intended in a particular statute is simplest, easiest. I take this position, Senator Grassley, in part because this is a short-lived commission, because the demands on it are going to involve fixing priorities, and because of the effectiveness of getting the kind of consensus that you spoke about earlier, eloquently and wisely, I might add.

Judge WALLACE. Could I make one caveat to my answer. It seems to me that we must come to grips with what I perceive to be a fun-

damental truth, and we might as well do it now rather than later: the court system is an asset that has limits. The approach over the years has been not to recognize this, and every time there is a backlog problem, to add some more judges.

Horizontal expansion will lead us into more problems. I think that has been largely true in Asia. It is certainly true in countries such as Egypt, where they have not dealt directly with the problem, and have added many judges. Sooner or later the Congress will need to take a look at this reaction to backlog. ADR's are a possibility. There are quite a few others.

I think it is important that the commission have a broad enough mandate so that it can look at our dispute-resolving process and decide, what should be done with article III judges. What is the most important area of dispute resolution in which they should be involved? That is not a decision for judges to make alone. It is a decision that also must be made by the representatives of the people. The commission will not only provide recommendations on this issue to the Congress, but will also provide background data that then will allow the Senators and the Congressmen to make appropriate decisions.

Senator GRASSLEY. Thank you, Mr. Chairman.

Senator HEFLIN. Judge Wallace, there has been some criticism in the past of this proposal on the timeframe, that really it ought to take a shorter length of time to make a study and submit it to Congress. There have been criticisms of 10 years. One of the bills that passed the Senate, I believe, made it a permanent study commission on the basis of following through, as you mentioned previously, on implementation.

Would you speak to why you feel that there is a need for a long-term study in regards to the commission?

Judge WALLACE. I would be happy to, Senator. As you will recall, the original concept—and the one, indeed, that was introduced in the first legislation—provided for two separate commissions, one of which was to have a limited life. That commission was to do what we referred to as the long-range study. I thought it would take 3 to 5 years. Then there would be a separate, permanent oversight commission that would make recommendations to the Congress annually based upon the initial study.

A compromise was made to combine the two commissions into one. I think bringing them together has resulted in questions about the life of the commission. That is, I think the answer is found by keeping separate the initial responsibility of the commission which is to study what the judiciary's needs will be in the year 2000, or however far downstream it wishes the study to continue. The separate oversight aspect provides for annual recommendations on a long-term basis.

If you focus on the first part (the study), it is easy to say, well, we need a commission for only 2 or 3 years. I suggest that if that is done, this commission will go no further than the many other commissions, the reports of which are presently gathering dust on many shelves throughout Washington, DC.

The genius of the bill is that it has an implementation process. That is, over a long period of time, little by little, the Congress adds to what will be needed in the year 2000. If very little is

needed in the future, you would need only a short-term commission. But I suggest to you that a lot of deferred maintenance is necessary. We have essentially done very little for 200 years in the way of major changes in the judiciary. Many now believe that in the year 2000 it will not function in the same way that it has functioned unless we make modifications. Those must be implemented carefully and in an incremental process. It will not do to continue to provide band aids to serious problems.

I think 10 years is too short. I understand these compromises have to be made. If you pick out a number, 10 years might sound like a long time. But if, on the other hand, you have the first 2 years or 3 years just to study the long-range needs, you leave only 6 or 7 years to make recommendations. But those recommendations might need to be made for 20 years.

My view is that if the commission has a 10-year life—and I hope it is not any less than that—at the end of 10 years it will have proven its worth. But I think it is important that it be a long-term commission. That is the only way it can be effective and carry out what needs to be done.

After all, the commission is not focusing on one problem in the judiciary. It will be concerned with the whole judiciary. It will take a look at the entire apparatus of how we solve disputes for the American people. After coming to the conclusion, as I am sure the commission will, that we must make modifications, it is in the most sensitive area that recommendations will be made: how the court system will affect the people; how their rights are to be protected; how this will be assured in the future; how modifications can be made that will still allow us to enjoy the same quality of justice.

That, it seems to me, requires a long-term oversight commission. I think it should be permanent, but 10 years has been established. I hope it is not any less than that.

Senator HEFLIN. Professor Levin, we have talked about the existing Federal Judicial Center, the Administrative Office of Courts, the Judicial Conference of the United States and the potential competition or lack of competition. I believe you commented with regard to a minimum of overlapping.

But one of the geniuses of this bill—using the language of Judge Wallace—is that it gives a different perspective with regard to the needs of the judiciary other than from judges. The above-mentioned existing organizations are judge organizations. This bill offers a three-branch approach and includes citizens on the commission. It gives a perspective from lawyers, citizens, Congress, the executive branch, which includes the administrative agencies, the Department of Justice, the Criminal Division of the Department of Justice, the Civil Division, the Tax Courts. In the Tax Court, certainly, a citizen perspective is needed there.

So I suppose this is really not a duplication but a broader perspective from other sources with the idea that it be comprehensive, rather than the present existing machinery that we have.

Mr. LEVIN. Mr. Chairman, I agree completely and entirely. I think to the extent that the present machinery has information, has done studies, even if they are studies of litigants satisfaction or dissatisfaction with a particular mechanism, they ought to be

brought to this commission who can then, with its richness of background, have a look at interpreting what has been brought to it.

I embrace completely and totally the philosophy that you have set forth, both in the bill and in your statement in this connection now.

Senator HEFLIN. Judge Wallace, you have mentioned the Asian courts, the Egyptians, and other places. Are we not doing just the same thing by adding more judges and personnel to the present system, rather than trying to improve the machinery and the methods?

Judge WALLACE. I believe that is correct. They have just added relatively more judges for a longer period of time than we have. For example, in India the average length of time it takes for a case from beginning to end is 20 years. Many countries, essentially, use the horizontal increase response rather than working on the problem directly.

In large measure, we have done the same. Some minor changes have been made, but I suggest to you that if Alexander Hamilton came back today and wanted to practice law, we could give him a short course in civil procedure, and he could begin practice; he would not even have to get a haircut. We have not made major changes.

Senator HEFLIN. Is there any thing else you would like to mention, Judge Wallace or Professor Levin, before we conclude this hearing?

Judge WALLACE. I would like to underscore the statement that you made, Senator, as to the importance of objectivity. Certainly, it is possible for the Federal Judicial Center or the Administrative Office to make the study. I point out that it would not save any money. They are already extended to their limits. They would need to hire staff, the same as the commission would. So using the Center or the Administrative Office would not save money.

But there is a question of objectivity. Judges have a perspective—it is true—and maybe because they focus on the problems, and are close to them, they may know the problems better. But at times judges may also be too close to the trees to see the forest. By having the other banches involved, it seems to me that a better solution will be achieved. The result will be a practical solution and, more importantly, one that the Congress will probably favor. Those Senators and Congressmen who are on the commission can provide the necessaary resource and leadership for the passage of those bills resulting from the annual recommendations.

I suggest to you that the time is far spent, that we can no longer wait. I think it is critical that the bill for this commission be enacted this session.

Senator HEFLIN. Thank you. The hearing will remain open for written questions if members of the committee have any or if some who attended the hearing today desire to submit comments. We would appreciate it if you would answer those questions as quickly as you can.

Professor Levin, again I would like to commend you for the outstanding job you have done as Director of the Federal Judicial Center. Your leadership as the Director has been unsurpassed, and as you retire at the end of July I would like to thank you for the

invaluable service you have been to this committee and to me personally.

Thanks seem so inadequate and well done seems so meager for the yeoman task that you have accomplished. You should be proud of your accomplishments and the lasting impact that you will leave upon the Federal courts. The best of luck to you in the days ahead.

Mr. LEVIN. Thank you, Mr. Chairman. You know, I am in your debt for so many things for so many years, and for the privilege of being here today, and I thank you very much, most sincerely, for those very gracious, generous comments.

Senator HEFLIN. Thank you, Judge Wallace and Professor Levin, for being with us today.

Thank you.

[Whereupon, at 3:12 p.m., the subcommittee adjourned, subject to the call of the Chair.]

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